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Viewpoint

'Better Pay For Bar Advocates': A Rejoinder

By William J. Leahy

If only the funding provided in Gov. Mitt Romney's budget bore the slightest relationship to the sunny picture painted by his chief legal counsel, Daniel B. Winslow, in his Feb. 9 Viewpoint piece ("Better Pay For Bar Advocates In A Bitter Economy").

In fact, the governor's budget, at $75.8 million for more than 250,000 cases in fiscal year 2005, slashes the funding needed to fulfill Massachusetts' legal obligation to provide counsel for poor persons in criminal defense, child welfare and mental health cases by more than $25 million.

The governor's budget largely ignores the reforms that the Committee for Public Counsel Services proposed in an effort to reduce counsel costs and improve the quality of our representation, and it attempts to evade the performance standards that have earned Massachusetts a well-deserved reputation as having the country's best-structured assigned counsel program.

The Money

Competent legal representation for the poor costs money. Some cases — criminal cases in the District and Boston Municipal courts, for example — are individually rather inexpensive, with average case compensation just over $202 last fiscal year.

But in Massachusetts there are so many of them — more than 137,000 — that their private counsel compensation cost almost $28 million last year.

Other cases, such as the Care and Protection cases brought by the Department of Social Services, are much more expensive, averaging $862 per client (child or parent) for legal representation in FY03. These cases consumed another $18.5 million in private counsel compensation last year.

The governor's $75.8 million request falls some $25 million short of the amount needed to fulfill Massachusetts' duty to enforce the right to counsel next year. At most, his budget identifies a total of $8 million in additional, non-tax revenue, which might alleviate this massive underfunding. Even if

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every dollar were to be collected — and our analysis suggests strongly that it will not be — this budget would still be close to $20 million in arrears.

CPCS Reforms Rejected By The Governor

(1) CPCS proposed this year, as it has proposed many times over the past dozen years, the establishment of an Indigency Verification Unit to check the information provided by persons seeking the appointment of counsel.

States such as Oregon have reported that creation of such a unit has reduced counsel costs by 10 percent, by providing real-time follow-up of the information provided by a person seeking counsel at the beginning of a case.

Such a system can work, because the fiscal relief is timely. If the person can afford to hire an attorney, for example, the assignment can be revoked early, before extensive work has been done by the publicly funded attorney. It is the difference between preventing fraud and chasing fraud after it has occurred.

Instead of embracing this practical approach, the governor's budget proposes a complex collection lawsuit scheme, which both our experience and our national survey of defender agencies reveal to be impractical.

(2) CPCS proposed this year, as it did last year, that every determination of indigency be reviewed at least annually. Such reexaminations would save scarce funds by requiring the hiring of counsel in some cases, and would result in orders for counsel fee collections in others. The governor's budget omits this reform.

(3) CPCS proposed major systemic reform in several areas. It has always been an incongruity that CPCS staff counsel were available to represent persons charged with major felonies, but not to represent children or parents in crisis.

With the Legislature's support, we have established successful staff programs in both child welfare (in Salem and Springfield) and juvenile delinquency (in Roxbury) representation; but these programs have yet to be made available statewide.

Given the counsel crisis caused by stagnant compensation rates and gubernatorial vetoes, it is time to make our Children and Family Law and Youth Advocacy programs available statewide. This reform would assure counsel to clients and improve the efficiency of the courts, which is an avowed goal of this administration.

The governor recognizes the merit of this proposal, at least as to western Massachusetts, but the funding for such a proposal is nonexistent in the governor's budget.

(4) We have calculated that up to $2.5 million of that $28 million spent on District Court criminal cases could be saved if our proposal to allow judges to treat lesser misdemeanors as civil infractions under G.L. 277, Sect. 70C were approved.

In fact, both branches of the Legislature did approve our amendment in

2001, but it was vetoed by then-Gov. Jane Swift. Instead of taking a decisive step to reduce counsel costs without jeopardizing our counsel assignment system, Gov. Romney's budget merely adds one misdemeanor to the list of those eligible for civil treatment, but he continues to require a prosecutorial motion before a judge may act to save money.

(5) Mandatory drug sentencing is a national failure. A majority of states — but not Massachusetts — has now recognized that mandated treatment works better and costs less.

The $3.6 million that CPCS spends to defend persons charged with mandatory drug offenses pales beside the estimated $90 million Massachusetts spends annually to incarcerate them; yet relaxing the mandatory sentence stranglehold would reduce our costs too.

In our budget message, we urged Gov. Romney to embrace the Massachusetts Sentencing Commission proposal concerning mandatory drug sentencing.

(6) The sex offender registration and dissemination bureaucracy reaches much too far back into the past, and therefore covers far too many former offenders. We have proposed that the rapidly escalating cost of this excess be reined in by statutory amendment, but the only changes endorsed by the governor have been toward greater excess and greater cost.

Governor's Proposed Reforms

(1) The first point to make about the "Retainer-Based Defined Compensation" system proposed by the governor is that it provides attorneys and their clients absolutely no protection against funding shortfalls. It does nothing for a lawyer to be able to ask CPCS for a $10,000 retainer, for example, if the funding has run dry — a danger we are currently facing due to the governor's July 2003 veto.

The second obvious point is that the promise of "better pay" is not matched, nor even approximated in this budget. The direct appropriation number does not lie. Does any lawyer seriously think he or she is going to command more money from a $75 million budget than from a $98 million one?

In his budget message, the governor himself stated that the retainer system is "projected to save $15 million in FY05." Our analysis confirms that the retainer-based program is designed to reduce compensation levels, not increase them. It does so by either eliminating or limiting the availability of hourly rates, and imposing flat fees that fail to compensate the attorney for the careful preparation and case investigation required by professional standards and CPCS Performance Guidelines.

It is nice to see the governor acknowledge the inadequacy of our current hourly rates, but his retainer-based plan provides no compensation for the thorough investigation and trial preparation that are the hallmarks of competent lawyering.

The third point is that the retainer-based program would undo a decade of cost reduction progress by replacing the largely paperless CPCS E-bill system with endless mounds of paper submitted by attorneys to justify their withdrawals. This is not progress.

Beyond these realities, the proposal itself is fiscally irresponsible and filled with inefficiencies. It requires CPCS to pay out $10,000 retainers on July 1 to "all bar advocates and attorneys assigned by the private counsel division[.]"

Thus, CPCS would be required to pay more than $25 million on the first day of the fiscal year, before any services were provided. Almost $6.4 million of that amount would go to the more than 600 lawyers who took one or more CPCS assignments last year, but who did not perform $10,000 worth of work during the entire year.

At the end of the fiscal year, CPCS would attempt to reclaim the unearned portion of those millions, "with the board of bar overseers as well as [by] institut[ing] civil proceedings to recover any unearned retainer or interest accrual that is not returned by participating attorneys."

After a thorough review, CPCS Private Counsel Division Deputy Chief Counsel Patricia Wynn reported to the committee that "the new system replaces one which rewards performance and encourages vigorous advocacy by paying hourly rates with one in which the client's interests and an attorney's financial interests are in conflict; many legal services and expenses are unpaid; compensation is reduced; experienced, senior attorneys are encouraged to discontinue assigned counsel work; mentors are unavailable; and zealous advocacy is discouraged."

This is not reform, which implies improvement. This is retrenchment and retreat.

(2) Reimbursement of the Value of Legal Services for Client Fraud: The governor's budget assumes that CPCS will collect $3 million in FY05 by contracting with collection lawyers to sue any client who "materially underestimates or misrepresents his income or assets or ability to pay to qualify for legal representation intended for destitute, indigent or marginally indigent persons[.]"

First, the idea is misplaced in the CPCS budget, because CPCS has no information that would help it decide which clients it should turn over for collection action. It is the Probation Department, not CPCS, that collects the financial information upon which a counsel assignment is made. CPCS possesses no data on which it could base a decision to sue a client on grounds of suspected fraud.

Second, the allegedly careless or fraudulent client would be sued not for the $150 or $300 that he arguably should have paid, but for $5,000, $7,500 or $10,000 that is defined as the "fair market value of [the] attorney services[.]"

This wild inflation — $5,000 is 25 times the average cost of legal representation for a District Court case — is designed to give collection outfits an incentive to participate in this scheme.

In any actual case, of course, the "rebuttable presumption" of such drastic inflation would quickly fall earthward as the attorney for the client explains to the court what the true cost of the representation actually was.

This court-clogging idea is as old as it is discredited. Our electronic survey

of defender agencies revealed that a similar concept has been on the books in Kentucky since the 1970s, and nothing has ever been collected.

The administration could reduce fraudulent claims for counsel much more effectively by providing every judicial session with instantaneous electronic access to Department of Revenue and Registry of Motor Vehicles data. It is more effective to close the barn door before the horse escapes, than to chase it over hill and dale.

(3) The three categories of indigency: Winslow argues that the creation of a third ("destitute") category of indigency, and the creation of a series of detailed inquiries and written findings by the judge in every case, will "simplify" the assignment and counsel fee collection process.

I think he should ask senior Probation Department officials for their assessment; those I have talked with point out that the current $150 fee (the nation's highest) is already the "default" position, since it goes into effect unless waived by the judge.

They express great concern that requiring judges to "conduct an inquiry of the person under oath and make specific written findings in the case docket" before finding a person "destitute" for counsel purposes will slow down the docket and make the courts less efficient.

CPCS takes a back seat to no one in its insistence that our services be restricted to those who cannot afford to pay for a lawyer. That is why we proposed counsel fees back in 1990. That is why we worked with the Supreme Judicial Court to close "loopholes" in the indigency rules in 1993. That is why we pushed for and actively participated in Chief Justice for Administration and Management Barbara A. Dortch-Okara's indigency verification working group in 1999-2000. That is why we have worked with the judges for years to improve counsel fee collections in lagging courts.

There is nothing in our long experience in counsel fee collections that supports the notion that counsel fees from indigent persons can be made to quadruple in a single year.

(4) There are some good ideas within the governor's budget proposal. We endorse his proposal to provide malpractice defense and indemnification to CPCS assigned private counsel, although our experience cautions against Winslow's assurance that there are few claims against bar advocates.

We support the amendment to supplement private bar representation with staff counsel as needed to ensure counsel availability in the four western counties.

We are pleased with the concept of year-end payments of up to 25 percent for private counsel and staff counsel alike; we wish only that the funding to afford those increases had accompanied the thought.

Even in these difficult economic times, many areas of state responsibility have received level or increased funding in the governor's budget proposal.

Last spring, during the 40th anniversary celebrations of the famous *Gideon* right-to-counsel decision, some commentators questioned America's resolve for vigorous enforcement of that landmark constitutional rule.

It is very disappointing to see the lack of commitment to such an essential societal principle expressed by Gov. Romney's budget proposal concerning the Committee for Public Counsel Services.

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